87-1393

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARTHUR LISAK,

Petitioner,

vs.

MERCANTILE NATIONAL BANK OF INDIANA and MERCANTILE BANCORP, INC., JOHN WIDMAR, HARRY F. SMIDDY, JR.; and UNKNOWN DEFENDANTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

i

Whether an Indiana State Court may, consistent with the Constitutional right of appeal absolute granted to the petitioner and others pursuant to Article 7, Section 6, of the Indiana Constitution of 1970, deny to petitioner the unconditional exercise of this right of appeal by placing in said Indiana Court Order prohibitions and conditions to the filing of a praecipe or notice of appeal with the Clerk of said Indiana Court to be so filed within 30 days required by Indiana law to commence the appeal process or forfeit this right of appeal forever.

ii

Whether an Indiana State Court may, consistent with Due Process of Law and Equal Protection of Law required by the Fourteenth Amendment to the United States Constitution, deny, prohibit, and condition the exercise of this State Constitutional right to appeal absolute.

iii

Whether failure by the petitioner to use or exercise alternative discretionary procedures available to him in Indiana, such as Petition for Mandamus, constitutes a waiver of this constitutional right of appeal absolute and failure to extend full faith and credit to the Indiana Constitution.

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on November 25, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, to this writing, is not yet reported. A copy of the opinion is included herein as Appendix A. A copy of the United States District Court opinion is included herein as Appendix B.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254(1) for review by certiorari of the decision of the United States Court of Appeals for the Seventh Circuit. A written opinion was issued by that Court on November 25, 1987. Neither petitioner nor any other party or person sought rehearing from this decision.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of the State of Indiana Constitution of 1970 is set forth in Appendix C.

STATEMENT OF THE CASE

This is a civil action seeking money damages, the cancellation of an alleged agreement and trust agreement, and for the return of money. Only the first two counts of the amended complaint filed below are involved here and the respondent Widmar is not involved in those two counts nor with this petition. This case was disposed of without trial or evidentiary hearing and solely on a Rule 12(b) Motion to Dismiss converted to a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure resting solely on the assertion of *res judicata* and preclusion of the prior Indiana Court proceeding and judgment and did not deny the facts asserted by petitioner in the complaint and affidavit filed in the federal action. The action was filed in the United States

District Court for the Northern District of Illinois and jurisdiction of that Court was invoked pursuant to 28 U.S.C. § 1332(a)(1) on claim of diversity of citizenship.

On February 23, 1978, the Indiana Lake Superior Court entered an Order wherein petitioner's Motion to Correct Error (required by Trial Rule 59 of Indiana before the commencement of an appeal) was denied and the Clerk of the Lake Superior Court, in said Order, was ordered not to accept for filing from petitioner or on his behalf any praecipe (Notice of Appeal) or other motions, papers, documents, or pleadings, and further prohibited from accepting or filing any such praecipe or Notice of Appeal or papers from petitioner or on his behalf unless and on the condition precedent that petitioner first deposit $5,000 cash with the Court Clerk as security for future attorney's fees. A copy of this Order is included as Appendix D.

Petitioner's amended complaint and affidavit filed below all claimed extortion, force, intimidation, threats of force, imprisonment and fraud by the defendants, their attorneys and agents, the opposing party in the Indiana litigation and the Indiana Court and Judge and Court personnel as the basis for seeking to set aside the alleged agreement and trust and for the allowance to him of damages and return of money of approximately $100,000 so paid by petitioner under these circumstances which were not denied by the defendants.

In the Court below, the petitioner has asserted his constitutional claims to the State Constitutional right of appeal absolute. The Court below rejected these claims as being waived for failure to pursue alternative discretionary procedure and being mere fee shifting constitutionally allowed by *Premier Electrical Contractors Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 68, 71-72 (7th Cir. 1986).

REASONS FOR GRANTING THE WRIT

I.

THE EXERCISE OF THE RIGHT TO APPEAL ABSOLUTE GUARANTEED BY THE INDIANA CONSTITUTION CANNOT BE ABRIDGED, MODIFIED, RESTRICTED, OR CONDITIONED BY THE INDIANA COURT NOR DENIED FULL FAITH AND CREDIT.

By Article 7, Section 6, of the Constitution of Indiana, the right of appeal in all cases, not only is absolute, but is also a constitutional right granted to the petitioner. In common meaning, the term, absolute, can only mean unconditional and without obstruction of any kind. Under Indiana Rules of Appellate Procedure, Rule 2(a), an appeal is initiated by filing with the Clerk of the rendering Court within 30 days, a praecipe after the denial by the Indiana Court of the Motion to Correct Errors. If the praecipe or Notice of Appeal is not so filed, the right to appeal will be forfeited and this is stated as much by Article 7, Section 6 of the Constitution of Indiana and by Rule 2(a) of the Indiana Rules of Appellate Procedure.

This Indiana Court Order of February 23, 1978 denied and deprived the petitioner from filing a praecipe or Notice of Appeal since the Order added to this exercise and as a right to the exercise of the right of appeal, the condition of first depositing with the Clerk of the Court the sum of $5,000 before the Clerk could file the praecipe or Notice of Appeal. The Clerk in this Order was prohibited from doing otherwise. The exercise of the constitutional right of appeal was thus deprived by this Indiana Court Order of being an absolute unconditional right to file and take an appeal.

This Order by the Indiana Court was not consistent with the Indiana Constitutional right of appeal granted to the petitioner and the Court below was in error in re-

jecting this contention of petitioner and thereby determining that preclusion and the doctrine of *res judicata* bars petitioner's action because the Indiana Judgment must be given full faith and credit per 28 U.S.C. § 1738.

Viewing this Indiana Court Order as a Constitutionally permissible fee shifting device as the Court below did, misunderstands and confuses the clear effect of this Order. This Court Order violates and revokes the right granted by the Indiana Constitution. While this Court has previously held that appellate review is not essential to Due Process of Law, but is a matter of grace, *Luckenbach S.S. Co. v. United States*, 272 U.S. 533 (1926), this is not the precise issue involved here. What is drawn in question is the failure of the Court below to grant full faith and credit to the Indiana Constitution as the State substantive law which a Federal Court sitting in diversity was bound to follow as required by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1738 and 28 U.S.C. § 1652.

II

ABRIDGING, MODIFYING, RESTRICTING, AND CONDITIONING BY THE INDIANA COURT OF THE EXERCISE OF THE RIGHT TO APPEAL ABSOLUTE GUARANTEED BY THE INDIANA CONSTITUTION VIOLATES THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Indiana Court Order of February 23, 1978 is further inconsistent with both the Due Process of Law and Equal Protection of Law Clauses of the Fourteenth Amendment to the Constitution of the United States.

This Indiana Court Order repeals the Constitutional right of appeal absolute granted by the Indiana Constitution. Whether this Indiana Court may have or may not

have the power to impose upon and order a litigant to post a security or appeal bond *after* the litigant exercises this Constitutional right by filing the timely Notice of Appeal is not the question to be decided here.

Instead, the Court below should have addressed the question of whether the Indiana Court Order can re-write the Constitution of Indiana to require the petitioner to first pay $5,000 to file the Notice of Appeal. The Indiana Constitution grants the petitioner an absolute entitlement to commence an appeal or forfeit the right to do so. This Order clearly denies the exercise of that right which cannot be denied in the first instance. It is a denial of Due Process of Law.

As stated by this Court in *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1971), the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review if a full and fair trial on the merits is provided. Here, the petitioner denies receiving a full and fair proceeding on the merits. Nonetheless, this Court in *Lindsey* stated that this Court has repeatedly held that when an appeal *is* afforded, it cannot be granted to some and denied to others without violating the Equal Protection Clause. The very wording of the Indiana Court Order ensures that result will happen. The holding of the Court below, if permitted to stand, allows this to happen here.

III.

THE DENIAL OF DUE PROCESS OF LAW CANNOT BE THE BASIS FOR WAIVER OF THE RIGHT TO APPEAL.

The Court below erred in holding that alternative discretionary procedures are the same as exercising the right of appeal. This was considered by the Court below in the context of applying preclusion to deny petitioner's claims of denial of a full and fair proceeding and opportunity to litigate in the Indiana Court by a denial of the *right* to

take an appeal, or, in other words, a denial of Due Process of Law by the Court whose judgment is given full faith and credit by the Court below.

The right of appeal here is not discretionary, but, in determining and finding the amount petitioner must first pay to be able to file his appeal necessarily makes the right of appeal discretionary with the Court.

The Lower Court analyzed in this manner to hold that the right of appeal here is the same as some other discretionary alternative procedure so suggested.

But as of *right*, the Indiana Constitution guarantees appeal absolute which plainly means appeal without need of favor or discretion.

While discretionary procedures may result favorably, this Court has previously said "[t]he continuing right of a citizen to Due Process of Law must rest upon a basis more substantial than favor or discretion" *Roller v. Holley*, 176 U.S. 398, 409 (1916). The Indiana Constitution is the "substantial" upon which the right of petitioner to Due Process of Law rests.

The holding of the Lower Court that petitioner waived his right of appeal thus rests upon the denial of Due Process of Law suffered by the petitioner. The reliance by the Lower Court upon *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700 at 705-06 (7th Cir. 1987) for this faulty reasoning is misplaced. There, the denial of the Constitutional right of appeal was not involved nor these admissions of wrong present here to prevent the use of preclusion as claimed here. The denial of this substantial Due Process right by the Indiana Court itself requires the judgment of that Indiana Court to be not binding upon the Federal Court nor entitled to full faith and credit by 28 U.S.C. § 1738. *Grunone v. Zollinger*, 341 F.2d 464 (7th Cir. 1965).

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-3126

ARTHUR LISAK,

Plaintiff-Appellant,

v.

MERCANTILE BANCORP, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 8293—**Paul E. Plunkett,** *Judge.*

ARGUED NOVEMBER 3, 1987—DECIDED NOVEMBER 25, 1987

Before BAUER, *Chief Judge,* and POSNER and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* The Superior Court of Lake County, Indiana, issued a decree of divorce between Arthur Lisak and Augusta Lisak in 1974. The decree ordered Arthur to pay $355,000 to Augusta. In 1976 Arthur, then (as now) a resident of Texas, visited Indiana; Augusta, contending that Arthur had not paid the 1974 judgment, obtained a bench warrant for his arrest. After a week in jail focused his mind, Arthur agreed to establish a trust worth $95,000 in settlement of the dispute. Augusta would be entitled to $600 per month and could invade principal for necessaries; Arthur would have a rever-

sionary interest if more than $20,000 remained at Augusta's death. Arthur signed a settlement agreement, deposited with the court assets worth about $20,000, and was released from jail. A month later he ponied up $80,000 in eash. He steadfastly declined to sign the instrument creating the trust, contending that he had been coerced into the settlement and that the trust instrument supplemented its terms.

The settlement provided that "in the absence of agreement as to such further provisions . . . the matter will be submitted to the Judge then sitting in Lake Superior Court, Room Number One, who shall make said decision, and the decision of said Judge shall be final and without recourse by either of the parties hereto." Augusta asked the Superior Court to approve the terms of the trust despite Arthur's recalcitrance. The court did so and appointed a commissioner to execute the instrument on Arthur's behalf. The commissioner signed on May 26, 1977, and the trust was funded. Arthur immediately filed a motion objecting to "errors" in the trust agreement. While this motion was pending, the trustee, Mercantile National Bank of Indiana, applied for permission to invest the corpus and distribute the monthly $600. The court granted permission and also allowed the Bank to distribute $3,500 of principal so that Augusta could buy household furnishings. Arthur had notice of both motions.

The Superior Court denied Arthur's motion to correct errors in February 1978 with an order providing that if Arthur wished to file any additional papers—including a notice of appeal from the judgment that he had agreed could not be appealed—he had to post a bond for $5,000 to cover any fees and costs Augusta might incur in hiring counsel to resist. Arthur did not file the bond, appeal, or ask any higher court in Indiana to issue a prerogative writ.

The trust agreement approved by the commissioner on Arthur's behalf in 1977 permitted the trustee to pay Augusta's medical and burial expenses. She died in Flor-

ida in August 1985. The Bank asked the Superior Court for permission to disburse all of the money in the trust, about $40,000, to pay Augusta's medical and burial expenses. This motion was accompanied by correspondence from Arthur's current lawyer, showing that Arthur was no more reconciled to the trust in 1985 than in 1977; an undisputed affidavit states that despite knowing the address of both Arthur (the holder of the reversionary interest) and Arthur's lawyer, the Bank did not serve copies of its motion on them.

Within a month of learning that his reversionary interest was worthless, Arthur filed this suit in federal court in Chicago against the Bank, its parent corporation (Mercantile Bancorp, Inc.), Harry F. Smiddy, Jr. (an officer of the Bank), and John Widmar, Augusta's husband at the time of her death. Arthur never served Smiddy, so the district court dismissed him from the suit; we discuss him no further. The district court also dismissed Mercantile Bancorp, the holding company; Arthur's brief on appeal does not discuss the propriety of his attempt to "pierce the corporate veil," and there is no apparent basis for doing so. The claim against the holding company therefore has been abandoned, leaving only the Bank and Widmar as interested parties. We shall return to the question how a domiciliary of Texas can litigate in Illinois against an Indiana bank and a domiciliary of Florida on account of events in Indiana and Florida.

The complaint, which by accretion has grown to five counts, charges the Bank with fraud in the establishment and operation of the trust in 1977 and 1978; it charges both the Bank and Widmar with substantive and conspiratorial violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-65. The RICO claims are based on federal law and invoke federal-question jurisdiction; the fraud claim is based on state law and supported by diversity of citizenship (as well as pendent jurisdiction).

We can terminate with dispatch the claims against the Bank—no matter their legal theory—arising out of the establishment and early operation of the trust. They are barred, as the district court held, by claim preclusion, a branch of res judicata. Arthur litigated and lost in 1976-78 all dispositive questions about the establishment, terms, and administration of the trust. He agreed to accept the decision of the Superior Court; nevertheless he litigated and lost a motion to "correct errors"; he resisted the Bank's applications to pay money out of the trust and lost. No method of attacking the creation and operation of the trust survives. True, the Bank as trustee was not technically a party to the proceedings creating the trust (though it was a party to the proceedings approving its administration of the trust), and Indiana still requires mutuality of estoppel, but the Bank was in privity with both Arthur and Augusta. It inherited Augusta's defenses. A court of Indiana would not entertain the contentions Arthur presses, to the extent he wants review of the establishment and early administration of the trust. See *Town of Flora v. Indiana Service Corp.*, 222 Ind. 253, 53 N.E.2d 161 (1944); *Jones v. American Family Mutual Insurance Co.*, 489 N.E.2d 160 (Ind. App. 1986). A federal court, required by 28 U.S.C. §1738 to give the judgments the same force they would have in Indiana, see *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Harris Trust and Savings Bank v. Ellis*, 810 F.2d 700 (7th Cir. 1987), may not entertain Arthur's effort to reopen what was settled in the 1970s.

Preclusion applies only if the party to be bound had a full and fair opportunity to litigate, and Arthur insists that he did not: the Superior Court required the posting of a bond. This effort to sidestep the effects of the judgments fails for two reasons. First, Arthur never used the remedies available to him in Indiana, such as a petition for mandamus, that might have eliminated the bond requirement. Having bypassed his remedies, Arthur may not start up seven years later in a different system of courts. E.g., *Harris Trust*, 810 F.2d at 705-06; cf. *Graham*

v. Schreifer, 467 N.E.2d 800 (Ind. App. 1984) (observing that a party may return to the rendering court to attack a judgment improperly obtained).

Second, there is nothing wrong with requiring a party to post a bond to cover costs. Whatever problems a penalty bond may create, see *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1971), a subject the Supreme Court may revisit in *Crenshaw v. Bankers Life & Casualty Co.*, 483 So.2d 254 (Miss. 1986), prob. juris. noted, 107 S. Ct. 1367 (1987), a bond to secure the payment of costs creates none. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547-55 (1949). Indiana allows courts to require losing litigants in divorce cases to pay their former spouse's attorneys' fees. Ind. Code §31-1-11.5-16. A state that elects to shift the costs of litigation also may require a solvent litigant such as Arthur to make an earnest of payment. See *DeLong v. DeLong*, 161 Ind. App. 275, 289-91, 315 N.E.2d 412, 421-22 (1974). (Arthur does not contend that fee shifting is unconstitutional as a price on access to the courts, and could not plausibly do so. *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 373-74 (7th Cir. 1987); *Coleman v. CIR*, 791 F.2d 68, 71-72 (7th Cir. 1986).) Arthur has not been a shy litigant, and the Superior Court may have suspected (based on Arthur's attitude about the 1974 judgment) that any subsequent fee-shifting order would be hard to enforce. The bond did not deprive Arthur of any entitlement to litigate, and the decisions of 1977 and 1978 are entitled to full preclusive effect.

It is not so easy, however, to mop up Arthur's contention that Widmar and the Bank defrauded him in administering the trust after 1978. Arthur apparently contests applications to, and payments by, the trust in the 1980s. To the extent these grow out of the decision of 1977, the claims are foreclosed. So, for example, Arthur's contention that the Bank could not pay Augusta's medical expenses because the trust should not have contained Article III ¶9, which permitted the money to be used in this way, is barred by issue preclusion. But to the extent Arthur

contends that the Bank has been a faithless fiduciary—and that Widmar has submitted false claims—the record does not support the district court's grant of summary judgment. Arthur and his current lawyer filed uncontroverted affidavits stating that they did not receive notice of the Bank's application for approval of the final disbursal and the dissolution of the trust in 1985. A decision to grant an ex parte application by a (supposedly) misbehaving trustee cannot bind Arthur, yet for all we can tell Arthur has had neither notice of nor opportunity to contest in Indiana anything the Bank has done since 1978. As settlor with a reversionary interest, Arthur had a property right in the corpus of the trust. *Hinds v. McNair*, 413 N.E.2d 586, 597-99 (Ind. App. 1980). The grant of summary judgment in the Bank's favor on grounds of issue preclusion therefore must be vacated, to the extent Arthur presents claims of maladministration after the date of the last hearing in Indiana of which he had notice.

We cannot stop here, however, because the district court dismissed the suit against Widmar on a different ground: lack of jurisdiction over the person. Widmar lives in Florida and had no dealings with Illinois, the state in which the federal court sits. Arthur invoked 18 U.S.C. §1965(b), which provides:

> In any action under [civil RICO] in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

The district court both declared that "section 1965 only addresses venue issues, not personal jurisdiction" and stated that if §1965(b) creates personal jurisdiction it "would be unconstitutional" because "a party may never be hailed [sic] before a forum with which he does not have even the minimum contacts required to satisfy Due Process." Neither proposition is tenable.

Section 1965(a) deals with venue in RICO cases, but §1965(b) creates personal jurisdiction by authorizing service. Service of process is how a court gets jurisdiction over the person. See *Butcher's Union v. SDC Investment, Inc.*, 788 F.2d 535, 538-39 (9th Cir. 1986) (treating §1965(b) as addressing personal jurisdiction). Service may be ineffectual if the Constitution makes it so, but there is no constitutional obstacle to nationwide service of process in the federal courts in federal-question cases. The "minimum contacts" cases such as *Shaffer v. Heitner*, 433 U.S. 186 (1977), *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), require only sufficient contacts between the defendant (or the defendant's transactions) and the forum. The question is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant. A state court may lack such an entitlement to coerce, when the defendant has transacted no business within the state and has not otherwise taken advantage of that sovereign's protection. A federal court sitting in a diversity case generally may issue process only within the territory a state court could, see Fed. R. Civ. P. 4; limitations on the power of the state therefore carry over to diversity litigation. A federal court in a federal question case is not implementing any state's policy; it exercises the power of the United States. And there can be no doubt that the national government is entitled to sanction Mr. Widmar for civil wrongs committed within the territory of the United States. Widmar may not demand that the court applying the law of the United States be conveniently located.

This approach to personal jurisdiction in federal courts has been established since 1878, when the Supreme Court rejected the very argument that the district court accepted. *United States v. Union Pacific R.R.*, 98 U.S. 569, 603-04 (1878), holds that Congress may make a court in Washington, D.C., the exclusive forum for certain claims arising under federal law. We applied that holding in *Fitzsimmons v. Barton*, 589 F.2d 330, 332-34 (1979), concluding

that a provision in the Securities Act of 1934 similar to §1965(b) not only creates personal jurisdiction over anyone within the United States but also is consistent with the Due Process Clause of the fifth amendment. See also, e.g., *SIPC v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). Congress establishes the district courts' personal jurisdiction. *Point Landing, Inc. v. Omni Capital International, Ltd.*, 795 F.2d 415, 422-27 (5th Cir. 1986) (en banc), cert. granted under the name *Omni Capital International v. Rudolf Wolft & Co.*, 107 S. Ct. 946 (1987), presents the question whether the omission from the commodities laws of a provision like §1965(b) confines federal courts to the process that can be served under Rule 4. RICO contains an explicit grant of nationwide service, however, and the Due Process Clause does not upset Congress's decision.

Although this case must be returned to the district court, it will not necessarily linger on the docket. It is hard to see how venue could be laid in Illinois. Any wrongs occurred in Indiana and Florida; the Bank is a national bank "located" in Indiana (see 28 U.S.C. §1348), and Widmar is a citizen of Florida. As a rule, "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." 28 U.S.C. §1391(b). RICO, which "otherwise provide[s]", permits venue to be laid in "any district in which such [defendant] resides, is found, has an agent, or transacts his affairs." 18 U.S.C. §1965(a). The claim did not arise in Illinois; neither the Bank nor Widmar resides or can be found in Illinois; although the complaint alleges that the Bank transacts affairs in Illinois, Arthur will be hard pressed to prove this given the constraints on interstate banking. Even if the Bank transacts affairs in Illinois, Arthur still must show that "the interests of justice require" (18 U.S.C. §1965(b)) that Widmar be haled into that court. Section 1965(b) authorizes nationwide service so that at least one court will have jurisdiction over everyone connected with any RICO enterprise.

A district court in Indiana will have that jurisdiction whether or not Widmar can be brought before the court in Illinois, so perhaps the ends of justice do not "require" his presence in this suit.

The complaint also is sketchy about what frauds Widmar and the Bank perpetrated after 1978, so sketchy that the complaint is unlikely to survive scrutiny under Fed. R. Civ. P. 9(b). See *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987). On top of that, Arthur's lawyer appears to believe that any two mailings create the necessary "pattern" of racketeering under RICO. Not so. *Ibid.*; and see, e.g., *Liquid Air Corp. v. Rogers*, No. 86-3001 (7th Cir. Nov. 13, 1987), slip op. 8-10, and *Appley v. West*, No. 86-1970 (Nov. 2, 1987), slip op. 11-14, this court's most recent efforts to define a "pattern". The only claims that we can discern, other than those dealing with events in the 1970s, have to do with Augusta's medical expenses, which do not look like a pattern. There may be additional problems; these are only the most apparent. The emptiness of the suit against Smiddy and the holding company, the origin of this dispute in a matrimonial grudge, the ferocity of the allegations of fraud coupled with the lack of specifics, and the high ratio of certitude to citation, suggest that this is the sort of litigation in which the district court should give special attention to Fed. R. Civ. P. 11. We trust that on remand the district court will give the existing and future filings a close look and inquire into the adequacy of the pre-filing investigation conducted by Arthur's lawyer. See *Brown v. Federation of State Medical Boards*, No. 86-2652 (7th Cir. Sept. 22, 1987); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082-84 (7th Cir. 1987).

The judgment is affirmed to the extent it dismisses the suit against Smiddy and Mercantile Bancorp, and to the extent it grants summary judgment on claims that have been the subject of decisions of the Indiana judiciary of which plaintiff received notice. The judgment otherwise is vacated, and the case is remanded for further proceed-

ings consistent with this opinion. Circuit Rule 36 shall not apply on remand. No costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR LISAK,

Plaintiff,

v.

MERCANTILE BANCORP, INC., a foreign corporation; MERCANTILE NATIONAL BANK OF INDIANA, a national banking corporation; JOHN WIDMAR, HARRY F. SMIDDY, JR., and UNKNOWN DEFENDANTS,

Defendants.

No. 85 C 8293—Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Pending before the court are the following motions: (1) Defendant Harry F. Smiddy Jr.'s ("Smiddy") Motion to Quash Return of Process or to Dismiss the complaint on grounds of improper service; (2) Smiddy's Motion to Dismiss for lack of personal jurisdiction, lack of jurisdiction over the res, and on grounds of res judicata and collateral estoppel; (3) Defendant Jack Widmar's ("Widmar") Motion to Dismiss for lack of personal jurisdiction; (4) Defendants Mercantile National Bank of Indiana and Mercantile Bancorp, Inc.'s (collectively "the Bank") Motion to Dismiss for lack of jurisdiction over the res; and (5) the Bank's Motion for Summary Judgment on grounds of res judicata and collateral estoppel.

For the following reasons, we

1) grant Smiddy's motion to quash;
2) grant Smiddy's motion to dismiss;
3) grant Widmar's motion to dismiss;
4) deny the Bank's motion to dismiss; and
5) grant the Bank's motion for summary judgment.

Facts

Plaintiff Arthur Lisak ("Plaintiff" or "Lisak") charges the Bank with illegal appropriation of funds (Count I) and breach of fiduciary duty (Count II) and charges all defendants with substantive RICO violations, 18 U.S.C. §1962 (Count III), RICO conspiracy, 18 U.S.C. §1962(d) (Count IV), and common law fraud (Count V).

This dispute arises out of divorce proceedings instituted by Lisak's former spouse, Augusta Lisak ("Augusta") in the Lake Superior Court sitting in Hammond, Lake County, Indiana, on August 2, 1974. The marriage was dissolved October 2, 1974. A settlement agreement entered into by Lisak and Augusta was filed with the Lake Superior Court October 25, 1976. The agreement awarded Augusta $20,000, title to an automobile, and a trust established for her use and benefit.

Lisak established the trust fund at the Bank with an $89,000 initial contribution pursuant to the settlement agreement with Augusta. The Settlement Agreement provided that Augusta was to receive $600 per month from the trust fund, and Augusta could obtain additional funds for "the necessities of life." The trust was to be irrevocable by Lisak and, if Augusta predeceased him, her children were to receive $20,000 from the trust fund with any remainder to go to Lisak.

Lisak duly deposited the appropriate amount with the court, but later refused to sign the trust agreement, claiming it did not agree with the negotiated settlement agreement. The Lake Superior Court then appointed a commis-

sioner invested with the power and authority to execute the trust agreement on behalf of Lisak. The Commissioner, Timothy Kelly, signed the trust agreement on behalf of Lisak on May 26, 1977. The same day, Lisak filed a motion in Lake Superior Court to correct alleged errors in the trust agreement. The Lake Superior Court denied this motion February 23, 1978.

While Lisak's Motion to Correct Errors was pending, the Bank sought, and received, leave from the Lake Superior Court to invest the trust corpus and to begin paying $600 per month to Augusta. On February 6, 1978, the Bank petitioned the Lake Superior court for leave to distribute additional funds to Augusta—$3500 to enable her to purchase household furnishings. Although Lisak, as contingent remainderman, objected to the petition on the grounds such households furnishings were not "necessities of life" and because he was not given proper notice, the court authorized the payment and ordered the Bank to pay Augusta the $3500 she requested.

On August 9, 1985, Augusta died following an illness requiring hospitalization. The Bank petitioned the Lake Superior Court for leave to distribute funds sufficient to pay Augusta's hospital and doctor bills and to pay her burial expenses. The trust contained $40,079 at the time of the petition, and the expenses incurred totaled $40,669. On August 14, 1985, the court ordered the payment of the remaining funds in the trust (the $600 shortfall to be absorbed by the hospital) and the trust terminated.

Plaintiff filed the present lawsuit in the District Court for the Northern District of Illinois on September 30, 1985, charging the Bank with illegally extracting money from him through the use of force, threats, coercion and other forms of duress. Jurisdiction was based on diversity: Plaintiff a Texas citizen and resident, the Bank domiciled and incorporated in Indiana. Plaintiff claimed he never consented to nor negotiated the trust agreement and neither adopted nor ratified it. Plaintiff also claimed he never authorized Timothy Kelly to act on his behalf; and that he deposited the money which became the trust corpus

only because he had been imprisoned unlawfully and was forced to deposit the money in order to secure his release. Thus, according to the complaint, because the Bank obtained plaintiff's money through extortion, the trust agreement was void ab initio, and every disbursement of funds was unlawful.

Plaintiff later amended the complaint to add a breach of fiduciary duty count, two RICO counts, and a common law fraud count. He also added as party defendants Smiddy, the Bank's Senior Vice-President and Trust Officer, and Widmar, an individual who allegedly received some of the unlawful payments from the trust. The individual defendants were only charged with the two RICO counts and the common law fraud count.

Discussion

I. Service of Process

Smiddy moves to quash service of process or dismiss the complaint as to him for insufficiency of process. Smiddy asserts in an affidavit attached to his motion that a summons was mailed to him care of the Bank without a copy of the complaint or amended complaint attached thereto. Plaintiff does not address whether Smiddy's service was proper. He does not argue that a complaint was attached to the summons served upon Smiddy or that it was unnecessary. Indeed, Plaintiff could not successfully challenge the necessity of attaching a complaint to the summons, for Fed.R.Civ.P. Rule 4(d) states in part, "[t]he summons and complaint shall be served together." This requirement must be met in order "to inform the defendant of the plaintiff's claim." *See, e.g., United States ex rel. Acoma and Laguna Indian Pueblos v. Bluewater-Toltec Irrigation District*, 100 F.R.D. 687, 688 (D.N.M. 1983).

Service, invalid ab initio, is not validated when the summons and complaint actually reach the defendant. *Martin v. New York State Dept. of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir. 1978); *Bennett v. Circus, U.S.A.*, 108 F.R.D. 142, 148 (N.D. Ind. 1985); *Budget Marketing, Inc. v. Toback*, 88 F.R.D. 705, 708 (S.D. Iowa 1981).

In addition, service of process is improper when the summons and complaint are delivered to a defendant's place of employment rather than his place of abode. Fed. R.Civ.P. Rule 4(d)(1); *Gipson v. Bass River Township*, 82 F.R.D. 122, 125 (D.N.J. 1979); Wright & Miller, *Federal Practice and Procedure: Civil §1096.* The summons was addressed to Smiddy at work; hence, even if a complaint was attached, service would be insufficient.

Finally, we cannot obtain jurisdiction over Smiddy in his individual capacity by service of process on the corporation. *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). Therefore, Plaintiff has failed to meet his burden of establishing validity of service of process. *E.g., Daley v. ALIA*, 105 F.R.D. 87 (E.D.N.Y. 1985); *Meredith v. Bush*, 90 F.R.D. 512 (E.D. Tenn. 1981).

Smiddy asks this court to either quash the service of process or dismiss the action against him. Generally, if service of process is insufficient but a reasonable prospect exists that plaintiff could properly serve defendant, a court quashes service but declines to dismiss the case. *See, e.g., Daley*, 105 F.R.D. at 89. However, because we believe that Plaintiff will be unable to properly serve process on Smiddy because Smiddy is not subject to this court's jurisdiction (see below), we will dismiss the amended complaint as to Smiddy.

II. Personal Jurisdiction

Smiddy and Widmar each seek to dismiss the amended complaint as to them on the grounds this court has no jurisdiction over their person. The amended complaint alleges that Smiddy is the senior vice-president, trust officer, employee, and agent of the Bank. The Bank allegedly does business in Cook County, Illinois. Widmar allegedly resides and "conducts affairs" in the states of Illinois and Indiana and elsewhere. Nothing more is said in the complaint which enables us to determine whether we have jurisdiction over Smiddy and Widmar.

Both Smiddy and Widmar submit affidavits stating that they do not transact business in Illinois nor own proper-

ty in Illinois nor reside in Illinois. Smiddy and Widmar thus conclude they do not fall within the scope of the Illinois long-arm statute, Ill.Rev.Stat. ch. 110, §2-209(a), and are not subject to this court's jurisdiction. We agree that Smiddy or Widmar are not within the reach of the Illinois long-arm statute. In his response brief, Plaintiff admits this court cannot obtain jurisdiction over Smiddy or Widmar via the Illinois long-arm statute. Nevertheless, Plaintiff seems to argue that personal jurisdiction over Smiddy and Widmar can be predicated upon the occurrence within Illinois of transactions and acts giving rise to a RICO claim. However, Plaintiff does not cite this court to any cases holding that a court has personal jurisdiction over all alleged members of a RICO conspiracy wherever a RICO action is brought. Indeed, he does not cite us to any cases whatsoever in his brief.

Plaintiff's argument is patently untenable. The logical extension of his argument is that a district court in which venue is proper pursuant to 18 U.S.C. §1965 has jurisdiction over every person, no matter where located, who allegedly was involved in the RICO conspiracy. Such a proposition is contrary to the language of RICO and would be unconstitutional.

RICO provides that an action may be brought against any person in the district where that person resides, is found, has an agent, or transacts his affairs. 18 U.S.C. §1965(a). The words "transacts his affairs" cannot be interpreted to authorize legal proceedings against an individual in a forum whose only contact with that forum is the illegal acts of others. Such an interpretation would render section 1965(b) extraneous. Section 1965(b) authorizes a district court to summon other parties residing in any other district when "the ends of justice require." If a court automatically had jurisdiction over all RICO conspirators, there would be no need for nationwide process "when the ends of justice require." We decline to adopt an interpretation that would render statutory language superfluous.

Furthermore, section 1965 only addresses venue issues, not personal jurisdiction. Venue and personal jurisdiction

are different concepts. Wright & Miller, *Federal Practice and Procedure: Civil §1063.* Venue looks at the convenience of the parties; personal jurisdiction is required as a constitutional matter. A party may be brought into a forum which is inconvenient "when justice so requires"; a party may never be hailed before a forum with which he does not have even the minimum contacts required to satisfy Due Process.

The Due Process Clause of the Fifth and Fourteenth Amendments requires that a non-resident defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). In personam jurisdiction exists when the cause of action arises out of conduct in the forum state, *Shaffer v. Heitner,* 433 U.S. 186 (1977), or when the non-resident defendant has sufficient continuous and systematic general contacts with the forum state. *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 414 (1984).

Plaintiff asks that this court exercise jurisdiction over Smiddy and Widmar even though neither of them have significant contacts with Illinois, nor did the cause of action arise out of any conduct of Smiddy or Widmar in Illinois. Smiddy and Widmar do not have the minimum contacts with this state to enable us to assert jurisdiction over them in accord with Due Process. Thus, we must dismiss Smiddy and Widmar pursuant to Fed.R.Civ.P. Rule 12(b)(2).

III. Jurisdiction Over the Res

The Bank has moved to dismiss the entire complaint pursuant to Fed.R.Civ.P. Rule 12(b)(1) for lack of jurisdiction over the subject matter. The Bank claims the Lake Superior Court acquired jurisdiction over the res—the trust—and has retained that jurisdiction to the exclusion of all other courts. The Bank also asserts that the termination of the trust in 1985 did not divest the Lake Superior Court of its exclusive jurisdiction over the trust.

In support, the Bank cites *Bock v. Hales*, 536 F.2d 1330 (7th Cir. 1976) and *Princess Lida v. Thompson*, 305 U.S. 456.

Princess Lida involved a trust set up as part of a divorce settlement. The issue was whether the exercise of jurisdiction by a state court over the administration of a trust deprives a federal court of jurisdiction over a later suit involving the same subject matter. For many years, the Pennsylvania Court of Common Pleas occasionally exercised jurisdiction over the Princess Lida trust to resolve disputes over the appointment of trustees, whether the trust should be amended, and so forth.

The Supreme Court recognized that the state court retained continuing jurisdiction to grant relief and enforce its judgments regarding the trust and its administration. 305 U.S. at 461. The court also recognized that such jurisdiction is exclusive:

> the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other. . . .

Id. at 466.

However, the Court noted that a court's jurisdiction over a trust ceases when the performance decreed by the trust agreement ends:

> When performance had been obtained the equity proceeding was at an end; the trust res in the hands of the trustees, who were the creatures of the [trust] agreement, then had the same status as if the court had never been called upon to act.

Id. at 461.

Hence, once the terms of a trust agreement have been fulfilled, the trustees are subject to any competent court's jurisdiction. They are no longer bound to the exclusive jurisdiction of one court. Thus, during the time the Lake Superior Court was involved in the administration of the trust at issue here, no other court could take jurisdiction and rule upon matters affecting the administration of the

trust. In *Princess Lida*, the federal court did not have jurisdiction because the trust was still extant and the trust was still being administered. Here, this federal court has jurisdiction over this matter because the Lake Superior Court has completed its role and the trust has terminated.

Because the Lake Superior Court no longer exercises jurisdiction over the trust, we need not address the difficult and complex question whether this action is *in personam* or *in rem*. *See Princess Lida*, 305 U.S. at 466; *Bock v. Hale*, 536 F.2d at 1332. Either way, we can exercise jurisdiction over the trust because no other court is doing so. Therefore, we deny the Bank's motion to dismiss.

IV. Res Judicata

The Bank and Smiddy seek to bar Plaintiff's suit on the ground the proceedings in the Lake Superior Court operate to preclude relitigation of whether the trust was lawfully created and whether funds were lawfully disbursed from the trust.

Plaintiff claims that on a motion to dismiss, we must accept all factual allegations in the Amended Complaint as correct. The Bank admits 12(b)(6) is not a speaking motion. However, the Bank has moved to convert its motion to dismiss into one for summary judgment. We grant the Bank's request to treat this motion as one for summary judgment pursuant to Rule 56.

Rule 56 provides that all parties shall be given reasonable opportunity to present all material pertinent to a summary judgment motion. We believe Plaintiff had such an opportunity. When the Bank filed its motion, although titled "motion to dismiss, it included a stack of certified documents from the Lake Superior Court. Plaintiff's attorney was mailed a copy of the motion and the accompanying documents. It should have been obvious to any lawyer that a litigant is really seeking summary judgment when it attaches numerous documents and spends many pages in its brief discussing the content and the relevance of

those documents. We are empowered by Rule 12(b) to treat a motion to dismiss as a summary judgment motion in such circumstances. We will thus proceed to consider the Bank's motion in accordance with Rule 56. If Plaintiff can present documents which demonstrate a genuine issue of material fact, he may do so in a motion to reconsider this decision.

A state court judgment commands the same res judicata effects in federal court that it would have in the court that entered it. 28 U.S.C. §1738; Wright & Miller, *Civil §4469* and case collected therein. A federal court examining the res judicata effect of a state decision must refer to the preclusion law of the state in which the judgment was rendered. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Hence, in the present case, we must examine Indiana law to determine the preclusive effect of the Lake Superior Court decisions.

Res judicata is composed of two separate branches—claim preclusion and issue preclusion. *Indiana State Highway Comm'n v. Speidel*, 392 N.E.2d 1172, 1174 (Ind. App. 1979). Claim preclusion occurs when a prior adjudication results in a final judgment on the merits rendered by a court of competent jurisdiction. The prior judgment then completely bars a subsequent action on the same claim between the same parties or those in privity with them. *Id.*; *Town of Flora v. Indiana Service Corp.*, 222 Ind. 253, 53 N.E.2d 161 (1943). Issue preclusion

> applies where the causes of action are not the same, but where some fact or question has been determined and adjudicated in the former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties.

Jones v. American Family Mut. Ins. Co., 488 N.E.2d 160, 165 (Ind.App. 1986) quoting *Town of Flora*, 53 N.E.2d at 163.

In the present situation the prior adjudication arose out of a divorce proceeding while the subsequent suit sounds in fraud. Yet many of the issues from the former suit are

being raised here. We therefore regard this case as one involving issue preclusion.

The essential elements which are generally required for the application of issue preclusion are

1) a suit and an adversary proceeding;

2) a final decision;

3) on the merits;

4) rendered by a court of competent jurisdiction;

5) identity of parties;

6) identity of subject matter or issues;

7) capacity of parties; and

8) mutuality of estoppel.

Brown v. United States, 570 F.2d 1311, 1320 (7th Cir. 1978) quoting *Amann v. Tankersley*, 149 Ind. App. 501, 509, 273 N.E.2d 772, 777 (1971).

All of these elements are satisfied in the present case. There can be little dispute over most of the elements; 1) the divorce proceedings were adversarial; 2) each of the orders were final (none have been appealed or reviewed); 3) the decisions were on the merits; 4) the Lake Superior Court is competent to issue orders necessary to execute a settlement agreement in a divorce proceeding (*see* Ind. Code Ann. §31-1-11.5-10, *et seq.*) (Burns 1980); 7) the parties had capacity to litigate; and 8) there is mutuality of estoppel.

The only elements that require pause are 5) and 6)—identity of parties and identity of subject matter. Although the Bank was not party to every issue in the divorce proceeding, it was a party to the key issues—whether the Bank could pay money out of the trust fund. The interests of the Bank and Augusta Lisak were sufficiently aligned when the Lake Superior Court decided on May 26, 1977 that the trust agreement as drafted was proper and ordered a commissioner appointed to sign on behalf of Lisak. Therefore, we find element 5)—identity of parties—to be satisfied.

Finally, element 6)—identity of issues—is also satisfied. Although the former adjudication was a divorce settlement and the current one is a RICO suit sounding in fraud, the particular issues involved are the same. Plaintiff alleges Timothy Kelly had no authority to sign the trust agreement on his behalf. The Lake Superior Court expressly authorized and ordered Kelly to sign. Plaintiff alleges the Bank improperly took money out of the trust fund. To the contrary, the Lake Superior Court on three separate occasions ordered the Bank to pay out sums of money. Plaintiff alleges he was coerced into depositing $89,000 with the clerk of the Indiana court. Actually, the court ordered him to deposit the money in accordance with a court approved settlement agreement.

Every issue Plaintiff now raises has been previously adjudicated against him. For the foregoing reasons, we hold his suit to be barred by the res judicata doctrine. To summarize:

1. Smiddy's motion to quash service of process is granted.

2. Smiddy and Widmar's motions to dismiss for lack of personal jurisdiction is granted.

3. Mercantile National Bank of Indiana and Mercantile Bancorp, Inc.'s motions to dismiss on res judicata grounds is treated as a motion for summary judgment and granted.

ENTER:

/s/ PAUL E. PLUNKETT
Honorable Paul E. Plunkett
District Court Judge

Dated: October 23, 1986

APPENDIX C

Indiana Constitution, Art. 7, Sec. 6

§ 6. Jurisdiction of Court of Appeals. – The Court shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases. [As amended November 3, 1970.]

APPENDIX D

State of Indiana
County of Lake ss.

In the Lake Superior Court
In Room Number One
In Hammond, Indiana

In Re The Marriage Of:
Augusta Lisak, Wife, and
Arthur Lisak, Husband.

Cause Number: 174-779

ORDER

The parties are present by counsel for hearing on all pending motions. Arguments heard. The Court now orders as follows:

Arthur Lisak moves to have the Court declare that Augusta Lisak has no interest in and to the following described real estate:

> "Lots 1, 2, 7, 8, 9, 10, 12, 13, 14, 15, 19, 20, 21, 33, 24, 25, 26, 27, and 28 in Block 1; Lot 3 in Block 3; Lots 3, 4, 5, 8, 9 and 10 in Block 4; Lots 4, 5, 8, 9, 12, 14 and 16 in Block 5 of Crestwood Park second subdivision to Hobart, Indiana and Lot 22 of Crestwood Park subdivision of Hobart, Indiana."

and in support thereof shows the Court that Augusta Lisak agreed to release all claims to said real estate in return for the sum of Ninety-Five Thousand Dollars ($95,000) pursuant to the terms of a certain Settlement Agreement entered into by the parties, and approved by the Court on October 25, 1976.

Augusta Lisak now moves the Court for an additional award of attorneys fees for additional work performed by her attorneys which was necessitated by Arthur Lisak's

refusal to abide by the terms of the Settlement Agreement of October 25, 1976.

The Court now denies the Motion for Correct Errors filed by Arthur Lisak.

The Court now finds that additional attorneys fees for work performed by the attorneys for and on behalf of Augusta Lisak exceed the sum of Three Thousand Dollars ($3,000).

It is now ordered, that all monies on deposit in the Office of the Clerk of this Court representing monies received or to be received from a deposit made in Cause Number 177-765 in this Court, entitled: Schilling Bros. Lumber Co. vs. Ronnie H. Jenkins, et al., shall be ordered to apply and immediately paid by the Clerk to Galvin and Galvin, Attorneys at Law, Attorneys for Augusta Lisak, in partial satisfaction of their claim for additional attorneys fees.

In the event no further work is required to be performed by the attorneys for Augusta Lisak, from and after the date of this Order, and in the further event that no praecipe is filed on behalf of Arthur Lisak with respect to the Motion to Correct Errors denied this date, payment by the Clerk of all monies received from Cause Number 177-765 which have become funds on deposit in this cause, which has been or will be made to Galvin and Galvin, Attorneys at Law, shall be in full and final satisfaction of Arthur Lisak's obligation to pay additional attorneys fees for the use of Augusta Lisak's attorneys, for all services rendered up to and including the date of this order.

The Court further orders that a deposit of Five Thousand Dollars ($5,000) cash, to serve as a security bond for an award of additional attorneys fees to attorneys performing work for Augusta Lisak, shall be required before the Clerk may accept for filing any other pleadings, documents, praecipes or other papers to be filed on behalf of Arthur Lisak.

It is further ordered that Augusta Lisak have no interest in the following described real estate:

> "Lots 1, 2, 7, 8, 9, 10, 12, 13, 14, 15, 19, 20, 21, 33, 24, 25, 26, 27, and 28 in Block 1; Lot 3 in Block 3; Lots 3, 4, 5, 8, 9 and 10 in Block 4; Lots 4, 5, 8, 9, 12, 14 and 16 in Block 5 of Crestwood Park second subdivision to Hobart, Indiana and Lot 22 of Crestwood Park subdivision of Hobart, Indiana."

SO ORDERED, this 23 day of February, 1978. Judgement accordingly.

/s/ JUDGE PINKERTON
JUDGE, LAKE SUPERIOR COURT